

UNITED STATES DISTRICT COURT  
DISTRICT OF MAINE

AMY HAMILTON,	)	
	)	
Plaintiff	)	
v.	)	Civ. No. 97-220-B
	)	
MAINE DEPARTMENT OF PUBLIC	)	
SAFETY, ET AL.,	)	
	)	
Defendants	)	

ORDER AND MEMORANDUM OF DECISION

BRODY, District Judge

In this civil rights action, Plaintiff, Amy Hamilton, alleges that Defendants, Maine Department of Public Safety and Maine State Trooper Ronald Brooks, discriminated against her on the basis of her disability by refusing to accommodate her disability and creating a hostile work environment. Plaintiff brings this action under the Americans with Disabilities Act (“ADA”), 42 U.S.C. § 12101 et seq. (Counts I & II), the Rehabilitation Act, 29 U.S.C. § 794 (Count III), the Maine Human Rights Act (“MHRA”), 5 M.R.S.A. § 4551 et seq. (Counts IV & V), and 42 U.S.C. § 1983 (Count VI). Plaintiff also alleges state tort law claims of negligent and intentional infliction of emotional distress (Counts VII & VIII). Before the Court is Defendants’ Motion for Summary Judgment on all Counts of Plaintiff’s Amended Complaint. For the reasons stated below, Defendants’ motion is granted as to Counts I-V, and denied as to Counts VI-VIII.

**I. SUMMARY JUDGMENT**

Summary judgment is appropriate in the absence of a genuine issue as to any material fact and when the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). An

issue is genuine for these purposes if “the evidence is such that a reasonable jury could return a verdict for the nonmoving party.” Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). A material fact is one that has “the potential to affect the outcome of the suit under applicable law.” Nereida-Gonzalez v. Tirado-Delgado, 990 F.2d 701, 703 (1st Cir. 1993). For the purposes of summary judgment the Court views the record in the light most favorable to the nonmoving party. See McCarthy v. Northwest Airlines, Inc., 56 F.3d 313, 315 (1st Cir. 1995).

## **II. BACKGROUND**

The following are the facts as alleged in Plaintiff’s Amended Complaint.<sup>1</sup> In November, 1995, Plaintiff was hired as a police officer by the City of Bath, Maine. As part of her job as a full-time police officer, Plaintiff was required to attend Basic Police School at the Maine Criminal Justice Academy (“the Academy”) in Waterville, Maine, on September 3, 1996. Plaintiff’s training session at the Academy was paid for by the City of Bath and lasted twelve weeks. Plaintiff was required to live at the Academy during the session but was permitted to return home for weekends.

Plaintiff suffers from bronchial asthma that is “exercise induced.” At the time of her admission to the Academy, Plaintiff informed school officials of her asthmatic condition. Participants in the Basic Police School, known as cadets, are required to pass a physical agility test in order to graduate. Plaintiff passed four of the five required exercises on the first try, but was not able to complete a mile and a half run within the time required until the sixth week of the

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<sup>1</sup> Plaintiff’s Statement of Material Facts in support of her Response to Defendants’ Motion for Summary Judgment is limited to five paragraphs of essentially legal conclusions. The Court, therefore, relies on the facts as alleged in the Amended Complaint and in the affidavits provided by Plaintiff.

program. Plaintiff ultimately completed all of the physical requirements needed to graduate and on November 22, 1996, Plaintiff graduated from the Academy and returned to the Bath Police Department as a full-time police officer where she is currently employed. Plaintiff's claims arise out of the allegedly discriminatory treatment she received from Academy officials during her training as a cadet.

As part of the Academy's training, cadets were frequently required to run long distances. On runs longer than a mile and a half, Plaintiff occasionally had difficulty keeping up due to her asthma. Plaintiff alleges that Defendant Brooks, the lead trainer, or "cadre," for the group of thirty-nine officers being trained, frequently ridiculed Plaintiff in front of other cadets for failing to keep up during long runs. According to Plaintiff, Brooks forced other cadets to run longer distances when she could not keep pace and, on one occasion, forced Plaintiff to run more than three miles without her asthma inhaler. In various forms Brooks and other trainers repeatedly and publicly ridiculed her asthmatic condition and questioned her motivation and dedication. On the evening before graduation at an awards dinner, Plaintiff was awarded derogatory awards entitled "thanks for nothing," "suck ass to the instructors," and "miss know-it-all," while other cadets received "positive" or "funny" awards.

Plaintiff alleges that she suffered mental anguish and anxiety, emotional trauma, loss of quality of life, loss of standing in her community, and irreparable injury to her reputation and good name as a result of her discriminatory treatment at the Academy. In addition, Plaintiff claims that Defendants' employment practices deprived her of equal employment opportunities.

### III. DISCUSSION

Defendants argue on summary judgment that Plaintiff does not suffer from a “disability” under the ADA, 42 U.S.C. § 12101(2), or the Rehabilitation Act, 29 U.S.C. § 706(8)(B). In order to state a claim under the ADA and the Rehabilitation Act, Plaintiff must adequately allege that she suffers from a “disability.” A “disability” consists of: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment. 42 U.S.C. § 12102(2); Abbott v. Bragdon, 107 F.3d 934, 938 (1st Cir. 1997).

The determination of whether a particular impairment constitutes a disability must be made on a case-by-case basis. Abbott, 107 F.3d at 941; 29 C.F.R. Pt. 1630, App. § 1630.2(j). “The requirement of individualized analysis is particularly appropriate in the context of disability claims relating to asthma.” Castro v. Local 1199, Nat’l Health & Human Serv. Employees Union, 964 F. Supp. 719, 723 (S.D.N.Y. 1997).

The severity of asthma varies a great deal among individuals. Symptoms may fall anywhere along the spectrum from mild to life-threatening, and the frequency of asthmatic symptoms also varies greatly from person to person. With proper treatment, however, asthmatic symptoms can almost always be controlled. Thus, individualized inquiries are especially useful when determining whether asthma constitutes a disability under the ADA.

Id. (citing United States v. Sherman, 53 F.3d 782, 787 (7th Cir. 1995)).

To establish a disability under the first prong of 42 U.S.C. § 12102(2), Plaintiff must show that she (1) has a physical or mental impairment; (2) that affects a major life activity; (3) to a substantial degree. Bercovitch v. Baldwin Sch., 133 F.3d 141, 155 (1st Cir. 1998).

There is little doubt that Plaintiff’s asthma constitutes a physical impairment. Heilweil v.

Mount Sinai Hosp., 32 F.3d 718, 723 (2d Cir. 1994) (citing 29 U.S.C. § 706(8)(B); 45 C.F.R. § 84.3(j)(2)(i)(A); 28 C.F.R. § 4131(b)(1)(i)). Whether or not Plaintiff's asthma affects a major life activity to a substantial degree is not as obvious. Id.

Plaintiff alleges that her asthma inhibits her ability to breathe.<sup>2</sup> Pl.'s Am. Compl. ¶ 11. Breathing is a major life activity. 29 C.F.R. § 1630.2(i) (major life activities include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning, and working"); Heilweil, 32 F.3d at 723. However, Plaintiff only suffers from a "disability" under the ADA if her asthma "substantially limits" her ability to breathe.

An individual faces a "substantial limitation" when she is:

- (i) Unable to perform a major life activity that the average person in the general population can perform; or
- (ii) Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform that same major life activity.

Soileau v. Guilford of Maine, Inc., 105 F.3d 12, 15 (1st Cir. 1997) (citing 29 C.F.R. § 1630.2(j)(1)). "One factor to be considered in determining whether an individual is substantially limited in a major life activity is 'the nature and severity' of the impairment." Id. (citing 29 C.F.R. § 1630.2(j)(2)(i)). "Impairment is to be measured in relation to normalcy, or, in any event, to what the average person does." Id.

In support of her claim that her asthma substantially limits her ability to breathe, Plaintiff offers her own affidavit and the affidavit of A.L. Mesrobian, M.D. First, Plaintiff claims that her asthma attacks have required hospitalization on "several occasions." However, her affidavit

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<sup>2</sup> Plaintiff does not allege that her asthma substantially limits her ability to work.

suggests that at least one such hospitalization was due primarily to a case of pneumonia and that another was due to an interaction of prescribed drugs (one of which was used to treat asthma). In fact, it appears that the only time Plaintiff was hospitalized for an asthma attack was immediately after completing a rigorous Maine State Police physical fitness test. Plaintiff also notes that she had difficulty working in a “smoky” Portland nightclub and was ultimately forced to resign from that job.

According to her own affidavit, Plaintiff is able to engage in “distance-running, skiing, swimming, skating, team sports” and other physical activities, although she claims that these activities “have the potential of resulting in asthma attacks.” Extreme hot or cold air can aggravate her asthma symptoms and, as a result, she must “sometimes” avoid skiing on an “extremely cold day.” At the same time, in a medical examination required for entry into the Academy, Plaintiff’s physician recommended her as “physically fit for exercising vigorously.” Defs.’ Ex. B. Plaintiff admits that she was able to complete every aspect of the Academy’s physical fitness program and placed seventeenth out of thirty-nine cadets in physical fitness. In addition, she had previously passed the physical fitness test required for admission to the Maine State Police.

Dr. Mesrobian’s affidavit does little to support Plaintiff’s claim. Mesrobian saw Plaintiff periodically after 1995, primarily for a hand and wrist injury. According to a medical history taken during an examination in November, 1995, Plaintiff was diagnosed with asthma in 1991 but showed “no symptoms since February 1992.” Although Mesrobian recalled that Plaintiff spoke to him about having difficulty with her breathing when she was exercising, he examined her and found that she was not “in any acute compromise or wheezing.” Mesrobian was not the

doctor who diagnosed Plaintiff with asthma, nor did he conduct any pulmonary testing or observe her having an asthmatic attack. As a result, Mesrobian was unable to state what symptoms Plaintiff would manifest if she did not take medication. Moreover, Mesrobian did not possess sufficient information to comment on the symptoms someone with Plaintiff's type of asthma exhibits. Mesrobian also noted "I really do not have any information or documentation, either written or on the basis of any physical observation, that would allow me to comment on whether Amy has ever had life-threatening asthma." Mesrobian, in his affidavit, suggested that Plaintiff contact her treating physicians for opinions and documentation. Plaintiff, however, has not provided the Court with medical records or the opinion of any doctor who actually treated her for asthma.

Most courts addressing this issue have found that asthma does not substantially limit an individual's ability to breathe where that individual is generally able to exercise or otherwise lead a relatively "normal life." In Castro, the court held that the plaintiff failed to demonstrate that her asthma substantially limited breathing where the evidence suggested that asthma restricted only her ability to go outside in extreme temperatures, and that either extreme humidity, extreme cold, or strong winds could trigger an attack. 964 F. Supp. at 725. In Heilweil, the Second Circuit concluded that where an individual's asthma restricted her only in a limited way and did not bar her from exercising, her ability to breathe was not significantly affected. 32 F.3d at 723 (citing Byrne v. Board of Educ., 979 F.2d 560, 565 (7th Cir. 1992) (concluding that in a respiratory impairment case, evidence person participated in recreational activities undermines finding that person is handicapped under Act)). See also Ventura v. City of Independence, 103 F.3d 1378, 1997 WL 94688, at \*7 (6th Cir. Mar. 4, 1997) (unpublished disposition), cert. denied,

118 S. Ct. 169, 139 L. Ed. 2d 112 (1997) (finding that plaintiff, an asthmatic, was not disabled under the ADA where he was able to engage in a number of activities including occasional running, football, calisthenics, playing the saxophone, and water-skiing, that belied his claim that his ability to breathe and work were significantly restricted); Emery v. Caravan of Dreams, 879 F. Supp. 640, 642 (N.D. Tex. 1995) (finding that plaintiff, an asthmatic, was not disabled under the ADA where she was able to lead a "normal life" that included working continuously as a flight attendant and engaging in activities such as rollerblading); Mobley v. Bd. of Regents of Univ. Sys. of Georgia, 924 F. Supp. 1179, 1187 (S.D. Ga. 1996) (absent evidence of nature, severity, duration, impact or extent of asthmatic condition, plaintiff is not substantially limited in breathing); Gaddy v. Four B Corp., 953 F.Supp. 331, 337 (D. Kan. 1997) (finding that plaintiff, a sixteen-year-old girl, who, after being diagnosed as an asthmatic, was able to play volleyball in gym class and perform as a cheerleader, was not disabled under the ADA because her ability to breathe was not substantially limited); Rhodes v. F.D.I.C., 956 F. Supp. 1239, 1247 (D. Md. 1997) (asthma and/or migraines may not serve as a basis for a disability claim where plaintiff leads "a full life in every respect," including bicycling and teaching ballet, so long as she is not exposed to cigarette smoke); Suttles v. U.S. Postal Service, 927 F. Supp. 990, 1004 (S.D. Tex. 1996) (plaintiff's asthma does not constitute a disability).

Plaintiff cites no cases where a particular case of asthma was found to constitute a disability, but rather relies primarily on two cases that state the generally accepted principle that asthma may be a disability depending on its severity. Mobley, 924 F. Supp. at 1186 (finding no disability), Rhodes, 956 F. Supp. at 1245 (same). In the only case the Court could find holding that a plaintiff's asthma constituted a substantial limitation on the ability to breathe, the plaintiff

was hospitalized repeatedly due to the severity of her attacks, required to continually take medication and treatments for her condition, and her doctor identified her illness as life-threatening. Hunt v. St. Peter Sch., 963 F. Supp. 843, 850 (W.D. Mo. 1997). The plaintiff in Hunt offered treating physician testimony that her asthma substantially interfered with her breathing. Id. No such evidence appears in this record.

The Court is persuaded that Plaintiff's physical impairment does not "substantially impair" her ability to breathe and, thus, does not constitute a disability under the ADA. Plaintiff's breathing is impaired only when she engages in strenuous physical activities, many of which are beyond the ability of an average person in the general population. Even then, she is sometimes able to participate in these activities without any ill-effects. As Plaintiff notes in her Amended Complaint, her asthma hampers only "her ability to sustain heavy aerobic exercise over a substantial length of time, but does not create problems in limited, short-term physical activities." Pl.'s Am. Compl. ¶ 11. Plaintiff admits that her asthma in no way interfered with her ten months of police work prior to attending the Academy. Id. Moreover, she offers no medical testimony that her condition substantially interferes with her breathing. To the contrary, one examining doctor determined her physically fit for exercising vigorously. Under the circumstances, the Court concludes that Plaintiff has failed to show that her ability to breathe is impaired to a substantial degree. As the First Circuit has recently noted, "[t]he impairment must be a significant one to trigger the Act's obligation." Soileau, 105 F.3d at 16 (holding that plaintiff's dysthymia, which affected his ability to interact with others, did not "substantially impair" a major life activity); see also Bercovitch, 133 F.3d at 156 (holding that student with attention deficit-hyperactivity disorder, oppositional defiant disorder, and childhood depression

did not suffer from “substantial limitation” of a major life activity).

In order to make out a claim for discrimination based on a record of impairment under the second prong of 42 U.S.C. § 12102(2), Plaintiff must show “that at some point in the past she was classified or misclassified as having a mental or physical impairment that substantially limits a major life activity.” Sherrod v. American Airlines, Inc., 132 F.3d 1112, 1120-21 (5th Cir. 1998). The impairment on record must be one that substantially limits a major life activity. Id. As discussed above, Plaintiff has failed to provide documentation of a “substantial limitation” on her breathing. Under the third prong, “an individual who has an impairment that is not substantially limiting (or has no impairment at all) is nevertheless ‘disabled’ if [s]he is treated by the employer as having an impairment that does substantially limit major life activities.” Katz v. City Metal Co., Inc., 87 F.3d 26, 32 (1st Cir. 1996) (citing 29 C.F.R. § 1630.2(l)(1)). Plaintiff has failed to provide evidence to support her claim that Defendants perceived her as being substantially limited in her ability to breathe. Therefore, Defendants’ Motion for Summary Judgment on Plaintiff’s ADA and Rehabilitation Act claims (Counts I, II & III) is granted.

In Counts IV and V Plaintiff repeats her allegations of disability discrimination under the guise of the MHRA, the state counterpart of the ADA and the Rehabilitation Act. “The Maine Supreme Court has indicated that analogous federal law informs the interpretation of the MHRA.” Abbott, 912 F. Supp. at 591 (citing Bowen v. Department of Human Services, 606 A.2d 1051, 1053 (Me.1992); Plourde v. Scott Paper Co., 552 A.2d 1257, 1261-62 (Me.1989)); see also Soileau v. Guilford of Maine, Inc., 928 F. Supp. 37, 54 (D. Me. 1996), aff’d, 105 F.3d 12 (MHRA claims hinge on the outcome of ADA claims). Therefore, Defendants’ Motion for Summary Judgment is also granted as to Counts IV and V.

Although Defendants' motion seeks summary judgment on all Counts of Plaintiff's Amended Complaint, Defendants have failed to address Plaintiff's section 1983 claim against Defendant Brooks. Therefore, Defendants' motion is denied as to Count VI.

Finally, Defendant Brooks claims in summary fashion that he is entitled to discretionary immunity from Plaintiff's state law tort claims of infliction of emotional distress pursuant to 14 M.R.S.A. § 8111(1)(C). The Maine Tort Claims Act provides absolute immunity for employees of governmental entities for "[p]erforming or failing to perform any discretionary function or duty, whether or not the discretion is abused . . . ." 14 M.R.S.A. § 8111(1)(C). The Maine Law Court has determined that discretionary immunity "insulates from personal liability a government employee who has been legislatively authorized to perform some discretionary function and 'has acted, or has failed to act, pursuant to that authorization.'" Erskine v. Comm'r of Corrections, 682 A.2d 681, 686 (Me. 1996) (citations omitted); see also Hegarty v. Somerset County, 848 F. Supp. 257, 269 (D. Me. 1994), aff'd in part and rev'd in part on other grounds, 53 F.3d 1367, (quoting Moore v. City of Lewiston, 596 A.2d 612, 616 (Me.1991)) ("An officer is exercising a discretionary function if he or she is 'required to use [his or her] judgment while acting in furtherance of a departmental policy [or a legislatively imposed duty].'"). Defendants have failed to support their argument with any evidence that Defendant Brooks was performing a legislatively authorized discretionary function. Therefore, Defendants' motion on Counts VII and VIII is denied.

#### **IV. CONCLUSION**

For the reasons discussed above, Defendants' Motion for Summary Judgment is GRANTED as to Counts I-V and DENIED as to Counts VI-VIII.

SO ORDERED.

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MORTON A. BRODY  
United States District Judge

Dated this 9th day of June, 1998.